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SR-73 and Lakeside Avenue Operations LLC d/b/a Powerback Rehabilitation, 113 South Route 73 and District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, Petitioner. Case 04-RC-161250

August 17, 2017

ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

The National Labor Relations Board has carefully considered the Employer's request for review of the Acting Regional Director's August 1, 2016 Decision on Objections and Certification of Representative, which is attached as an appendix, as well as the Petitioner's opposition brief. The request for review is denied as it raises no substantial issues warranting review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The relevant facts are fully set forth in the Acting Regional Director's decision. Based on those facts, and contrary to our dissenting colleague, we affirm the Acting Regional Director's finding that the evidence produced by the Employer was insufficient to demonstrate that its care managers are statutory supervisors because they assign or responsibly direct other employees within the meaning of Section 2(11) of the Act.¹

I.

With respect to assignment, we reject the dissent's contention that review is warranted of the Acting Regional Director's finding that the Employer's evidence of independent judgment "lacked specificity." It is well established that generalized and self-serving testimony cannot suffice to prove Section 2(11) supervisory authority. See *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 1 (2015), enf'd. 670 Fed.Appx. 697 (11th Cir. 2016). We agree with the Acting Regional Director, for the reasons stated in his decision, that the Employer's evidence on this issue was either conclusory or lacking in specificity. In particular, we reject the dissent's contention that the Employer established that care managers exercise independent judgment in assigning employees through the testimony of Care Manager Mar-

¹ The Employer did not request review of the Acting Regional Director's finding that care managers do not discipline employees within the meaning of Sec. 2(11).

sha Lake, who stated that she considers employee skill level and patient acuity when having to assign a cart nurse who lacks a permanent room assignment (floater) to an open slot. As the Acting Regional Director found, Lake did not describe any specific examples of situations where a care manager considered the skill level and patient acuity in assigning a floater. See *G4S Regulated Security Solutions*, supra, slip op. at 2, quoting *Oil Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority"), cert. denied 404 U.S. 1039 (1972).

We also reject the dissent's contention that the Employer established that care managers exercise independent judgment in assigning employees through Lake's testimony that she has reassigned a cart nurse who has difficulty providing wound care from a patient requiring such care. Lake only testified to one specific example. On that occasion, "the nurse on the other cart took care of the patient." Given that there are two cart nurses assigned to each wing of the Employer's facility, Lake's reassignment of a patient to the only other nurse on the wing did not involve the exercise of independent judgment. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006) (where "there is only one obvious and self-evident choice . . . then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data."); see also *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 1 (2015).

II.

With respect to responsible direction, we reject the dissent's contention that review is warranted to determine whether the Acting Regional Director conflated independent judgment in assigning employees with independent judgment in directing employees. As in *Peacock Productions*, 364 NLRB No. 104, slip op. at 4 (2016), we do not reach this issue because "[e]ven assuming that [care managers] use independent judgment in directing other employees, the [Acting] Regional Director correctly found that the record does not establish that the Employer holds [care managers] accountable for their direction of others." Contrary to the dissent, accountability was not established by the testimony of: former Center Nurse Executive Patricia Melora that care managers are accountable for their team's timeliness in completing work and that she has spoken with care managers about unhappiness with how their team performed; Care Manager Lake that Melora told her when she was hired that care managers are responsible for staff nurses;

or Care Manager Kelly McCarthy that she considers herself responsible for the performance of her team. Such generalized and conclusory testimony is insufficient to establish that care managers are accountable for their direction of others. See *id.*

III.

The dissent further contends that the potential existence of care managers' supervisory authority is evident from the three-factor "guide" that he has proposed in prior dissents for determining supervisory status. See *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 5 fn. 9. We reject this proposal for the reasons we have previously stated. See *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. 2–3 (2015), and *WSI Savannah River Site*, 363 NLRB No. 113, slip op. 2–3 (2016). Here, the dissent relies principally on the fact that if supervisory authority is not vested in care managers, then the supervision of 20 employees on the day and evening shifts is performed by 2 clinical directors, and the supervision of 16 employees on the night shift is performed by 1 clinical director. The law is clear, however, that the ratio of staff-to-supervisory employees, as with all secondary indicia, cannot by itself provide a basis for a supervisory finding. See *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 3 fn. 4 (2014); *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993). And, as discussed, the Employer in this case has not established the existence of any primary indicia of supervisory status that would permit consideration of second indicia.²

Dated, Washington, D.C. August 17, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

I dissent from my colleagues' order denying review in two respects.

First, contrary to the Acting Regional Director (ARD), I believe the ARD's findings of fact, when properly ana-

² Finally, in denying review, we find that the Acting Regional Director did not abuse his discretion by refusing to enforce the Employer's subpoena duces tecum upon Clinical Director Summer Valenti. See *Northern States Beef*, 311 NLRB 1056, 1056–1057 (1993).

lyzed in light of the standards set forth in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), support the conclusion that the Employer's care managers are supervisors under Section 2(11) of the National Labor Relations Act (NLRA or Act) because they have authority to assign and responsibly direct employees, and they exercise independent judgment in doing so. Accordingly, I would grant review, conclude that the care managers are statutory supervisors, and remand this case to the ARD to decide an issue he left undecided—namely, whether the election must be set aside under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), on the basis that the care managers were supervisors who engaged in objectionable prounion conduct.

Second, I believe the ARD should have enforced the Employer's subpoena seeking electronic communications of Clinical Director Summer Valenti regarding the Union. Thus, I would grant review on this issue as well, and on remand, I would direct the ARD to reopen the record, enforce the subpoena, permit the Employer—if it so chooses—to introduce further evidence obtained through the subpoena (if any exists) regarding prounion conduct by Valenti, and take any other actions that appear appropriate on remand.

BACKGROUND

The Employer is a short-stay acute rehabilitation center located in Voorhees, New Jersey. Overall responsibility for nursing care of patients is vested in a center nurse executive. Below the center nurse executive in the nursing-care hierarchy are the clinical directors, and below the clinical directors are the care managers. Below the care managers are cart nurses and certified nursing assistants (CNAs). Two clinical directors are on duty during the day shift (7 a.m. to 3 p.m.) and evening shift (3 p.m. to 11 p.m.), and one clinical director is on duty during the night shift (11 p.m. to 7 a.m.). Four care managers are on duty at all times, working 12½-hour shifts (7 a.m. to 7:30 p.m. or 7 p.m. to 7:30 a.m.). Cart nurses also work 12½-hour shifts, 8 per shift. CNAs work the same 8-hour shifts as the clinical directors, 12 on the day and evening shifts and 8 on the night shift.

A representation election was conducted on November 4, 2015, in a unit consisting of the Employer's cart nurses.¹ The final tally of ballots shows that 16 employees

¹ Some cart nurses are registered nurses (RNs) and others are licensed practical nurses (LPNs). RNs are professional employees, LPNs are not, and NLRA Sec. 9(b)(1) precludes the Board from finding a bargaining unit appropriate if the unit includes both professional and non-professional employees unless a majority of the professional employees vote for inclusion in the unit. Accordingly, pursuant to *Sonotone Corp.*, 90 NLRB 1236 (1950), the election was held in separate

voted for and 14 voted against representation by the Union, with one nondeterminative challenged ballot. The Employer filed timely objections alleging that the election must be set aside because its supervisors—specifically, its care managers and Clinical Director Summer Valenti—engaged in prounion conduct that reasonably tended to interfere with employee free choice. The ARD found that the care managers are not supervisors under NLRA Section 2(11); having so found, he declined to decide whether any care managers engaged in prounion conduct. The parties stipulated that the clinical directors are Section 2(11) supervisors, but the ARD found that the record failed to support a finding that Clinical Director Valenti engaged in objectionable prounion conduct. The ARD also reaffirmed his decision, made during the hearing on the Employer’s objections, not to enforce the Employer’s subpoena seeking Valenti’s texts, emails, social media postings, and other electronic communications regarding the Union. Valenti did not petition to revoke the subpoena.

In its request for review, the Employer seeks enforcement of the subpoena. I would grant review as to this issue, for the reasons explained below. The Employer also contends that the ARD disregarded record evidence relevant to determining whether care managers are supervisors under NLRA Section 2(11). I find it unnecessary to grant review for the purpose of examining the portions of the record the Employer cites in support of this contention because, as explained below, I believe the ARD’s own findings of fact establish that care managers are statutory supervisors.

DISCUSSION

A. The Employer’s Care Managers Are Statutory Supervisors.

1. The applicable standards.

Section 2(11) of the Act defines the term *supervisor* as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

“The burden to prove supervisory status is on the party asserting it”—here, the Employer. *Oakwood Healthcare*, 348 NLRB at 687. Thus, to establish that its care managers are

supervisors under Section 2(11) of the Act, the Employer must show that (1) the care managers possess authority to perform at least one of the 12 supervisory functions listed in Section 2(11) of the Act, (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.² See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–713 (2001); *Oakwood Healthcare*, 348 NLRB at 687. The Employer can prove that care managers possess supervisory authority by demonstrating that they have the authority either to perform a supervisory function or to effectively recommend the same. *Oakwood Healthcare*, 348 NLRB at 687.

In *Oakwood Healthcare*, the Board defined the following terms and phrases contained in NLRA Section 2(11): “assign,” “responsibly to direct,” and “independent judgment.” First, the Board held that, in Section 2(11), the term *assign* refers

to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.

Oakwood Healthcare, 348 NLRB at 689. The Board in *Oakwood Healthcare* distinguished between giving an employee significant overall duties or tasks to perform, which is to *assign*, and giving an employee an “ad hoc instruction [to] perform a discrete task,” which is to *direct*. *Id.* The Board also made clear that a putative supervisor *assigns* when he or she gives an employee significant overall duties for the duration of a shift. *Id.* at 695 (finding that charge nurses *assigned* when they matched staff to “the patients that they [would] care for over the duration of the shift”).

Second, as indicated above, a putative supervisor “directs” when he or she gives an employee an “ad hoc instruction [to] perform a discrete task.” *Id.* at 689. However, Section 2(11) requires that direction be “responsible,” and the Board in *Oakwood Healthcare* stated that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee *must be accountable for the performance of the task by the other.*” *Id.* at 691–692 (emphasis added). The Board further explained that “to establish accountability for purposes of responsible direction,

it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It

voting groups for the RNs and LPNs, and a majority of the RNs voted for inclusion in a single unit together with the LPNs.

² No party disputes that if care managers have statutory supervisory authority, they hold that authority in the Employer’s interest.

also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id. at 692.³

Third, the Board in *Oakwood Healthcare* held that “to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 692–693. The Board further explained that a judgment is not independent if it is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. at 693.

2. The Employer’s care managers have authority to assign employees and exercise independent judgment in doing so.

The ARD’s findings demonstrate that care managers have authority to assign employees. Thus, the ARD found that (i) although most cart nurses have permanent room assignments, care managers assign floaters and agency nurses to open slots; (ii) Care Manager Marsha Lake testified that one cart nurse assigned to her area has difficulty providing wound care, and Lake will switch nurses’ assignments if a patient needing wound care is admitted to this nurse’s regularly assigned room; (iii) Care Manager Lake sometimes assigns a second CNA to assist with a patient if the patient has a history of being difficult or has a condition that would make it unsafe for just one CNA to provide care; and (iv) Care Manager Rachel Upshur alters assignments when there is a call out. These findings show that care managers give employees significant overall duties to perform for the duration of a shift, which establishes that care managers possess authority to assign within the meaning of NLRA

³ I disagree with subsequent cases involving whether an individual possesses authority “responsibly to direct” that have construed “accountability” in an extremely narrow manner, finding that “accountability” only exists if there is proof that a putative supervisor was disciplined for mistakes or deficiencies of subordinate employees. See, e.g., *Community Education Centers, Inc.*, 360 NLRB 85, 85 (2014). I disagree with this restrictive interpretation because it fails to recognize that accountability exists whenever a putative supervisor is deemed responsible for his or her “own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work.” Id. at 86 (Member Miscimarra, concurring in part and dissenting in part) (quoting *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2158 (2011) (Member Hayes, dissenting)). Indeed, it is so rarely the case that a supervisor suffers the consequences when a subordinate performs poorly—as opposed to being held accountable for his or her *own* performance in directing and overseeing the subordinate’s work—that the Board’s restrictive interpretation of “accountability” effectively nullifies the statutory phrase “responsibly to direct.”

Section 2(11). See *Oakwood Healthcare*, 348 NLRB at 689, 695.

The ARD’s findings also establish that at least on some occasions, care managers exercise independent judgment in assigning employees to patients. Independent judgment is exercised when a care manager switches assignments to avoid assigning a nurse who has difficulty providing wound care to a patient requiring such care, and when care managers assign floaters and agency nurses to open slots. Regarding the latter, Case Manager Lake testified that if more than one employee without a permanent assignment must be assigned,⁴ she considers employee skill level and patient acuity in deciding which employee to assign to which slot. Thus, care managers exercise independent judgment in assigning employees. See id. at 698 (finding that a charge nurse exercises independent judgment in assigning subordinate nurses when he or she “makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients”).

The ARD acknowledged that care managers assign employees, but he found the evidence insufficient to support a finding that they exercise independent judgment in doing so. In reaching the latter finding, the ARD committed several errors.

First, the ARD found that care managers do not exercise “significant judgment” in assigning nurses when more than one nurse must be assigned. He did not explain what, in his view, makes a judgment “significant”—but the Board in *Oakwood Healthcare* observed that “[i]n the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion,” and “[m]atching a nurse with a patient may have life and death consequences.” 348 NLRB at 695. Thus, the judgment exercised by the Employer’s care managers in assigning floaters and agency nurses to patients would appear to be inherently significant. More importantly, with regard to judgment, NLRA Section 2(11) sets a *qualitative* standard, not a quantitative one. It requires that judgment be “independent,” not that it be “significant.” As explained above, the judgment care managers exercise in assigning employees is independent.

Second, the ARD found that care managers “do appear to exercise judgment in adjusting overall patient assignments,” but he dismissed this evidence on the basis that it “lacked specificity.” Unrebutted evidence of supervisory authority is frequently dismissed on this basis. However, unrebutted evidence is just that; and as I have observed

⁴ The ARD found that most cart nurses have permanent room assignments. Floaters and agency nurses do not.

on a number of occasions, “the Board should not disregard un rebutted evidence . . . ‘merely because it could have been stronger, more detailed, or supported by more specific examples.’” *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting) (quoting *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 3 (2015) (Member Miscimarra, dissenting)).⁵ Moreover, I believe the all-too-frequent practice of dismissing un rebutted evidence of supervisory status on the basis that it is insufficiently specific or detailed creates the appearance that the Board may be “rejecting evidence that does not support the Board’s preferred result.” *Id.*, slip op. at 9 (Member Miscimarra, dissenting) (quoting *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 490 (2d Cir. 1997)).

Third, the ARD acknowledged that the evidence showed care managers have exercised “some level of judgment” in assigning employees, but he found this evidence insufficient to support a finding of supervisory status because it did not show that care managers exercise supervisory authority “on a more than occasional or sporadic basis.” Contrary to the ARD, I believe that where the evidence shows that independent judgment is exercised *when called for* in carrying out a supervisory function (such as assigning), it is immaterial that independent judgment may be called for only occasionally. Here, the ARD’s findings regarding the testimony of Care Manager Lake establish that when more than one nurse who lacks a permanent room assignment must be assigned to an open slot, Lake considers employee skill level and patient acuity in making the assignment. In my view, this establishes that care managers exercise independent judgment in assigning employees, even if the number of occasions that call for its exercise may not be numerous. The ARD’s contrary approach is at odds with the well-established principle that Section 2(11) of the Act requires *possession* of authority to carry out a supervisory function, not the actual exercise of that authority. See, e.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Formco, Inc.*, 245 NLRB 127, 128 fn. 7 (1979).

⁵ See also *Young Brothers*, 20–RC–176883, 2017 WL 971648, at *1 fn. 1 (Mar. 8, 2017); *University of Southern California*, 365 NLRB No. 11, slip op. at 3 (2016) (Member Miscimarra, dissenting); *LakeWood Health Center d/b/a Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3 (2016) (Member Miscimarra, dissenting); *Matson Terminals*, 20–RC–173297, 2016 WL 6069609, at *1 (Oct. 7, 2016) (Member Miscimarra, dissenting in part); *Hawaii Stevedores*, 20–RC–169598, 2016 WL 5390634, at *1 (Sept. 27, 2016) (Member Miscimarra, dissenting); *Building Contractors Assn., Inc.*, 364 NLRB No. 74, slip op. at 4 (2016) (Member Miscimarra, dissenting); *Veolia Transportation Services, Inc.*, 363 NLRB No. 188, slip op. at 13 (2016) (Member Miscimarra, dissenting).

For these reasons, I would find that the Employer’s care managers have authority to assign employees and exercise independent judgment in doing so.

3. The Employer’s care managers have authority responsibly to direct employees and exercise independent judgment in doing so.

The ARD found it “clear from the record that Care Managers do direct the work of the cart nurses and nursing assistants.” I agree. The evidence cited by the ARD shows that care managers (i) monitor cart nurses to ensure proper treatments are being given, prescribed medications are being dispensed, and reports are being completed; (ii) direct cart nurses to complete uncompleted tasks and to finish tasks in a timely manner; (iii) assign a second cart nurse to handle an admission if multiple patients are admitted to a single cart nurse’s area; (iv) direct CNAs to turn patients and cart nurses to change catheters more frequently than required by the Employer’s protocols; (v) direct employees to perform specific tasks in emergency situations; (vi) direct cart nurses to assist other nurses who have fallen behind in distributing medications; and (vii) assign nurses to perform treatments on another nurse’s patients if the nurse assigned to the patient is inexperienced or has trouble performing the treatment.

With regard to accountability, the ARD also found that care managers “can take corrective action if assignments are not handled properly.” See *Oakwood Healthcare*, 348 NLRB at 692 (stating that authority to take corrective action is an aspect of accountability). In this regard, the ARD cited evidence that care managers have counseled employees for taking overlong breaks and failing to inform the care manager of changes in a patient’s condition, and that Care Manager Upshur informs a clinical director if she receives reports of employees failing to perform assigned tasks. The ARD also noted evidence that employees have been disciplined for incidents reported by care managers.

Nonetheless, for two reasons, the ARD concluded that care managers are not statutory supervisors on the basis of having authority responsibly to direct employees. First, the ARD found the evidence insufficient to establish that care managers exercise independent judgment in directing employees. Second, the ARD found that the Employer failed to show that care managers are accountable for their direction. I disagree on both counts.

The ARD’s findings amply demonstrate that care managers regularly exercise independent judgment in directing employees. At minimum, care managers act “free of the control of others and form an opinion or evaluation by discerning and comparing data,” *Oakwood Healthcare*, 348 NLRB at 692–693, when they (i) direct

CNAs to turn patients, and cart nurses to change catheters, more frequently than required by the Employer's protocols; (ii) direct employees to perform specific tasks in emergency situations; (iii) direct cart nurses to assist other nurses who have fallen behind in distributing medications; and (iv) assign nurses to perform treatments on another nurse's patients if the nurse assigned to the patient is inexperienced or has trouble performing the treatment.

In finding to the contrary, the ARD improperly conflated independent judgment in *assigning* employees with independent judgment in *directing* employees. He acknowledged that care managers exercise "medical judgment" when they decide that catheters should be changed and patients turned more frequently than protocols require, but he found this insufficient to demonstrate independent judgment absent evidence that care managers exercise independent judgment "in determining *which* employee should be assigned to perform the required tasks" (emphasis added). This would be a proper consideration if the issue under analysis was whether independent judgment was being exercised in *assigning* employees. As the Board found in *Oakwood Healthcare*, the charge nurses at issue there exercised independent judgment in *assigning* nurses—i.e., in giving them "significant overall duties" for the duration of an entire shift, 348 NLRB at 689, 695—where they decided which nurses to assign to which patients "based upon the skill, experience, and temperament of . . . nursing personnel and on the acuity of the patients." *Id.* at 698. But the ARD cited no case, and I am aware of none, in which the Board has held that in an acute-care facility, independent judgment in *directing* employees—i.e., in giving employees "ad hoc instruction" to "perform a discrete task," *id.* at 689—requires a similar evaluation of subordinates' skills, experience, and temperament in selecting *which* employee to perform the task. Indeed, a moment's reflection reveals the unsoundness of such a proposition. For example, care managers direct employees to perform specific tasks in emergency situations. In medical emergencies, when discrete tasks must be done and done *now*, a care manager directing the performance of those tasks is not at leisure to weigh variables of skill, experience, and temperament. Moreover, once an employee has been assigned a particular patient for the duration of a shift, there will rarely be any question who will be directed to perform a discrete task with regard to that patient. Obviously, it will be the nurse or CNA assigned to the patient. To hold that a care manager does not exercise independent judgment in directing that employee to perform a task because the care manager did not pause to decide whether *some other* nurse or CNA should substitute for the

assigned employee would effectively rule out the very possibility of independent judgment being exercised by care managers in directing the Employer's nursing personnel. (It would also almost certainly mean that *nobody* would exercise independent judgment in directing the nursing personnel, since the clinical directors would also direct the employee assigned to a patient to perform discrete tasks regarding that patient.) Thus, I believe the direction of an employee to perform a discrete task evinces independent judgment where the judgment regarding the task to be performed is exercised "free of the control of others" and is not "dictated or controlled by detailed instructions," *Oakwood Healthcare*, 348 NLRB at 692–693, even if the choice of employee to perform that task depends primarily on who is available.⁶

The ARD also deemed the evidence insufficient to show that care managers exercise independent judgment in directing cart nurses and CNAs "on more than a sporadic basis." However, this finding resulted from the ARD's dismissal of the vast majority of the evidence that care managers exercise independent judgment in directing employees based on the rationale discussed and re-

⁶ The Board's decision in *Croft Metals, Inc.*, 348 NLRB 717 (2006)—a decision issued concurrently with *Oakwood Healthcare*—supports my interpretation of independent judgment in directing employees. In *Croft Metals*, the employer manufactured doors and windows, utilizing crews of employees. The crews were headed by lead persons, and one of the issues in the case was whether the lead persons were statutory supervisors on the basis of responsible direction. The Board found that the lead persons directed the employees on their crews and were accountable for their direction, *id.* at 722, but they did not exercise independent judgment. In so finding, however, the Board relied on evidence that the tasks performed by crew members were routine—not that lead persons did not decide *which* employee should perform which task:

For example, the testimony reflects that, in loading trucks, the lead persons follow a preestablished delivery schedule and generally employ a standard loading pattern that dictates the placement of different products in the trucks. Proffered examples of instructions given to employees by lead supervisors consisted of matters such as "where to put it and how to put it," and directions to retrieve loading bands or missing items slated for delivery. Similarly, the Employer's evidence regarding the production and maintenance employees indicates that such employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance. The Employer's own witnesses, to the extent that they testified about the lead persons' judgment involved in directing the crews, described such directions as "routine." The Employer adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making production decisions and directing employees. Thus, we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical.

Id. In contrast, in the instant case, when a care manager directs nurses to perform discrete tasks during a medical emergency, he or she is making decisions that are anything but routine or clerical; and in keeping with *Croft Metals* this warrants a finding that the care managers exercise independent judgment in directing employees in such emergencies regardless whether they also decide which nurses to assign which tasks, as the ARD required.

jected in the previous paragraph. Setting aside that rationale, the ARD's findings reveal ample evidence that care managers exercise independent judgment in directing cart nurses and CNAs. Moreover, and repeating a point made above, supervisory status under Section 2(11) turns on *possession* of supervisory authority, not its exercise.

I also believe the evidence cited by the ARD sufficiently establishes that care managers *responsibly* direct employees. In this regard, the ARD referred to evidence that (i) former Center Nurse Executive Patricia Melora testified that care managers are accountable for making sure their subordinates complete their work in a timely manner, (ii) Melora testified that she had spoken with care managers about subordinate performance, (iii) Care Manager Lake testified that when she was hired as a care manager, Melora told her that she would be responsible for the work of cart nurses, and (iv) Care Manager McCarthy testified that she considers herself responsible for the performance of subordinates. Although McCarthy did not expand upon this testimony, Lake's testimony regarding what she was told when hired as a care manager reasonably suggests why McCarthy deems herself responsible for the performance of subordinates—i.e., because she *is*. More specifically, Care Manager Lake testified that she was called in on her day off to resolve a failure in protocol by a cart nurse working under her. Lake testified she was concerned that she would be disciplined for this incident. Although the evidence cited by the ARD in this regard is not overwhelming, I believe it suffices to show that care managers are accountable for their direction of cart nurses and CNAs.

Thus, in addition to finding that the Employer's care managers have authority to assign employees, I also find that the care managers have authority responsibly to direct employees; and the ARD's findings further demonstrate that care managers exercise independent judgment with regard to both supervisory functions.

4. Application of "Common Sense" factors further supports a finding that the Employer's care managers are statutory supervisors.

I believe the Board must recognize that, as a practical matter, many businesses cannot function without a reasonable number of people exercising supervisory authority at a particular facility, during a particular shift, or in relation to a particular function. Therefore, in every case in which supervisory status is at issue, I believe the Board should take three "common sense" factors into account: (i) the nature of the employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those

whose supervisory status is in dispute.⁷ Applying these factors here, first, the Employer's operation is that of a 124-bed acute-care rehabilitation facility. Second, the work performed by undisputed statutory employees includes dispensing medications, dressing wounds, changing catheters, administering IVs, monitoring patients' conditions, and completing reports documenting the foregoing. Third, if all supervisory authority is vested in persons other than the care managers, this would mean that all supervision of 20 undisputed statutory employees on the day and evening shifts (8 cart nurses and 12 CNAs) is performed by the 2 clinical directors on duty during those shifts, and all supervision of 16 undisputed employees on the night shift (8 cart nurses and 8 CNAs) is performed by the single clinical director on duty during the night shift. While these supervisor-to-employee ratios are not unreasonable, the nature of the Employer's operations and the critical importance of overseeing patient care closely support a smaller ratio, which finding the care managers to be supervisors would achieve. In addition, if care managers are not supervisors, this would mean that cart nurses would change supervisors mid-shift, since cart nurses work 12½-hour shifts that overlap two 8-hour shifts worked by clinical directors. In contrast, care managers work the same 12½-hour shifts as cart nurses and thus would provide continuity of supervision for the entire duration of their shift. Accordingly, these three factors further support a finding that the care managers are statutory supervisors.

In sum, I would find that the Employer's care managers are statutory supervisors on the basis that they have authority to assign and responsibly direct employees and exercise independent judgment in doing so. Accordingly, I would grant review and remand this case to the ARD to decide whether the election must be set aside under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), on the basis that the care managers engaged in objectionable prounion conduct that reasonably interfered with employee free choice.

⁷ I first articulated these factors in *Cook Inlet Tug & Barge*, above, 362 NLRB No. 111, slip op. at 5 fn. 9 (Member Miscimarra, dissenting), in which the Board majority held, over my dissent, that tugboat captains failed to qualify as statutory supervisors. Subsequently, I explained in *Buchanan Marine*, above, 363 NLRB No. 58, slip op. at 9 (Member Miscimarra, dissenting), that these factors were not a new test for supervisory status, but rather a guide regarding how the Board should apply the types of supervisory authority listed in Sec. 2(11). See also *Veolia Transportation Services, Inc.*, 363 NLRB No. 188, slip op. at 13–14 (2016) (Member Miscimarra, dissenting); *G4S Government Solutions, Inc. d/b/a WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 6–7 (2016) (Member Miscimarra, dissenting); *LakeWood Health Center d/b/a Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3–4 (2016) (Member Miscimarra, dissenting).

B. The Employer's Subpoena Should Be Enforced.

Finally, I would grant review of the ARD's decision to deny enforcement of the Employer's subpoena seeking the texts, emails, social media postings, and other electronic communications of Clinical Director Summer Valenti regarding the Union. The Employer alleges that Valenti made a prounion statement. Although the statement was made outside the critical period preceding the election, the Employer subpoenaed Valenti to uncover whether her electronic communications contained evidence of similar, potentially objectionable prounion comments or activities during the critical period. The ARD denied the Employer's request to enforce the subpoena, pointing to other avenues the Employer might have taken to obtain this information. The ARD then concluded that "the Employer's subpoena to Valenti is, at best, a fishing expedition. The Employer may hope the subpoena will turn up objectionable conduct but has offered no particular reason to think it will." For three reasons, I believe the ARD erred in refusing to enforce the subpoena.

First, a subpoena duces tecum *requires* the party to whom a subpoena is issued to produce the evidence set forth in the subpoena, unless the party petitions the Board to revoke the subpoena and the Board revokes it. See NLRA Section 11(1);⁸ Board's Rules and Regulations Section 102.66(f). Valenti did not petition to revoke the subpoena.

Second, it is not a prerequisite to having a subpoena enforced that the party serving the subpoena believes or has reason to believe that the subpoenaed documents (or, in this case, electronic communications) exist. The purpose of a subpoena duces tecum is to determine *whether* the subpoenaed documents exist. Accordingly, the ARD's criticism of the Employer's subpoena as "a fishing expedition" misses the mark. Besides, the Employer's subpoena can hardly be described as a fishing expedition when the Employer knew that Valenti had made a prounion remark to the cart nurses, and it was reasonable for the Employer to at least suspect that she may have made additional prounion statements. It cannot be a precondition to securing subpoena enforcement that a party

knows the subpoenaed materials exist, since the very purpose of the subpoena is to determine *whether* they exist. Were the Employer already aware of additional prounion comments, it would not need a subpoena to determine whether Valenti had made them.

Third, it is not grounds to refuse to enforce a subpoena that the party serving the subpoena might have been able to obtain the information it seeks through other means. In explaining his decision to refuse to enforce the Employer's subpoena, the ARD named two witnesses who worked with Valenti on the night shift and opined that the Employer should have been able to discover any additional prounion activity by Valenti through them. This reasoning disregards that a subpoena duces tecum is a statutorily authorized means through which parties to a Board proceeding may determine whether potential evidence exists and, if it does, obtain it. That the evidence might be obtainable by other means is not grounds to refuse to enforce the subpoena.⁹

In sum, since the Employer's subpoena sought relevant evidence of Valenti, since Valenti did not comply with Board procedures to revoke that subpoena, and since the grounds relied upon by the ARD to refuse to enforce the subpoena do not withstand scrutiny, I would grant the Employer's request for review on this issue as well, and on remand, I would direct the ARD to reopen the record, enforce the subpoena, permit the Employer—if it so chooses—to introduce further evidence obtained through the subpoena (if any exists) regarding prounion conduct by Valenti, and take any other and further actions as appropriate on remand.

CONCLUSION

Accordingly, regarding the above issues, I respectfully dissent.

⁸ Sec. 11(1) states, in relevant part: "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring . . . the production of any evidence in such proceeding . . . requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter . . . in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required."

⁹ *Northern States Beef*, 311 NLRB 1056 (1993), relied upon my colleagues, is distinguishable. In that case, the regional director declined to enforce a subpoena for a list of attendees at a union meeting where a union representative testified, under oath, that if the list ever existed at all, it would have been kept in a particular box, and the box had been lost. *Id.* at 1057. Thus, in *Northern States Beef*, sworn testimony established that the subpoenaed list, if it ever existed at all, had been lost and could not be produced. Here, in contrast, no testimony established that the subpoenaed communications did not exist or could not be produced. Furthermore, in denying subpoena enforcement in *Northern States Beef*, the regional director found that "the interests of the employees in not having the fact that they attended a union meeting revealed to their employer far outweigh the employer's rights to obtain that information." *Id.* No such balancing considerations are at issue in this matter. To the extent that the regional director in *Northern States Beef* additionally relied on considerations similar to those relied upon by the ARD, I believe the regional director was wrong to do so for the reasons explained above.

Dated, Washington, D.C. August 17, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, a representation election was held in this case on November 4, 2015, in a unit consisting of the Employer's registered and licensed practice nurses. The final tally showed 16 votes for and 14 votes against Petitioner with one non-determinative challenged ballot.¹ The Employer filed timely objections, and a hearing regarding the objections was conducted before Hearing Officer Elana Hollo. On June 30, 2016, the Hearing Officer issued a Report recommending that the objections be overruled and that Petitioner be certified as the representative for unit employees.

The Employer has filed exceptions to the Hearing Officer's Report. Having reviewed the record, the Employer's Exceptions and supporting Memoranda and Petitioner's Opposition, I have decided to affirm the rulings made by the Hearing Officer at the hearing and, for the reasons set out below, to adopt her recommendations.

A. Background

The Employer operates a 124-bed acute rehabilitation center in Voorhees, New Jersey. The first floor of the three story facility contains administrative offices, a kitchen and areas in which therapy is performed. Patients are housed on the second and third floors with each of these floors consisting of two hallways. Each hallway can accommodate 31 patients.

A center nurse executive has overall responsibility for the nursing care provided to patients at the Employer's facility. Denise Johnson currently serves as center nurse executive. Patricia Melora occupied the Nurse Executive position prior to mid-October 2015.

¹ The registered nurses voted for inclusion in the same unit as the licensed practical nurses. The initial tally of ballots showed two determinative challenged ballots, but a hearing was held to determine the status of one of these voters, and the Hearing Officer concluded that the voter, Angela Lee, was not eligible. I adopted the Hearing Officer's conclusions in a Decision issued on January 11, 2016. The Board denied the Employer's request for review on March 29, 2016.

Reporting to the nurse executive are clinical directors. Clinical directors work 8-hour shifts—7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; and 11 p.m. to 7 a.m. Two Clinical Directors are normally present on the day and evening shifts, one for each floor. There is only one clinical director present on the 11 p.m. to 7 a.m. shift.

Beneath the clinical directors are care managers, cart nurses and certified nursing assistants. Care Managers and cart nurses work 12½-hour shifts, either 7 a.m. to 7:30 p.m. or 7 p.m. to 7:30 a.m. The certified nursing assistants work the same 8-hour shifts as the Clinical Directors.

Care managers must be registered nurses. There are typically four care managers present on each shift. Reporting to the care managers are the cart nurses and nursing assistants. Cart nurses can be either registered or licensed practical nurses. Eight cart nurses are assigned to each 12½-hour shift, four per floor. Twelve nursing assistants are assigned on the day and evening shifts with six assistants allocated to each floor. There are eight nursing assistants on the 11 p.m. to 7 a.m. shift, four on each floor. In addition to the care managers, cart nurses and nursing assistants, a health unit coordinator is assigned to each twelve hour shift. The unit coordinators are nurses who perform clerical duties such as scheduling appointments and entering information into the facility's computer system.

The election in this case was held in a unit consisting of the Employer's cart nurses. Clinical directors, care managers and health unit coordinators were specifically excluded. The parties agree that Clinical Directors are supervisors within the meaning of Section 2(11) of the Act. They disagree on the status of the care managers. The Employer maintains that the care managers are statutory supervisors. Although Petitioner agreed to exclude them from the bargaining unit, it insists they do not possess supervisory authority.

The Employer initially filed four election objections, but failed to produce evidence at the hearing to support two of the objections. The Hearing Officer dismissed these objections for lack of proof, and the Employer has not excepted to this portion of her Report.

The two remaining objections focus on the conduct of care managers and Clinical Director Summer Valenti. The Employer contends that Care Managers interfered with the election by soliciting other employees to sign authorization cards and by expressing support for Petitioner during the critical period preceding the election. As for Valenti, the Employer produced evidence of a single arguably prounion remark which she made prior to the filing of the petition and contends this comment also tainted the vote.

In her Report, the Hearing Officer found the Employer had failed to demonstrate that the care managers possessed supervisory authority within the meaning of Section 2(11) of the Act. As a consequence, she found that any pro-Petitioner comments made by the care managers were not objectionable. Alternatively, she concluded that, even assuming the Care Managers were statutory supervisors, the evidence produced by the Employer of pro-Petitioner remarks by Care Managers was not sufficient to overturn the results of the election. As for the single arguably prounion remark made by Clinical Director Valenti, the Hearing Officer decided it was also insufficient to require a second election.

The Employer objects to both the Hearing Officer's conclusion that its care managers are not statutory supervisors and to her refusal to find that the conduct by care managers shown at the hearing was sufficient to require a second election. Similarly, it argues that Valenti's pro-Petitioner remark was enough to taint the election and excepts to the Hearing Officer's failure to adopt this position. Finally, the Employer objects to the quashing of subpoenas which it served on the Union and cart nurse Marilyn Viscome seeking social media, texts and chats regarding the Union campaign involving care managers and Clinical Directors. It also excepts to my refusal to delay the hearing so that a subpoena seeking similar information from Clinical Director Valenti could be enforced.

As I explain below, I agree with the Hearing Officer that the Employer failed to demonstrate that the Care Managers exercise powers sufficient to make them supervisors within the meaning of the NLRA. Given this conclusion, I find it unnecessary to reach the question of whether the prounion comments by care managers found by the Hearing Officer are sufficient to justify overturning the election.² As for the single prounion remark attributed to Valenti by the Employer, I agree with the Hearing Officer that it is not enough to warrant a second election. Further, I reaffirm my decision made during the hearing that it is not appropriate to delay this proceeding to enforce a subpoena seeking possible pro-Petitioner social media postings by Valenti.

² Since the quashed subpoenas were designed principally to secure additional information regarding pro-Petitioner conduct by Care Managers and I am concluding that the care managers have not been shown to be statutory supervisors, I find that the information sought by the subpoenas is mostly irrelevant and that the subpoenas were properly quashed. See, *Veritas Health Services*, 362 NLRB No. 32, at fn. 1 (2015). The Employer has moved to reopen the record to include documents related to Petitioner's Petition to Revoke the subpoenas served on Petitioner and Ms. Viscome. The Motion is granted, and the documents attached to the Employer's Motion are hereby made part of the record in this case.

B. The Status of The Employer's Care Managers

At the hearing, the Employer argued that the care managers exercised supervisory authority in disciplining, assigning and directing cart nurses and certified nursing assistants (Tr. 731–742). In the area of discipline, the Hearing Officer properly concluded that the care managers' role is limited to reporting possible infractions. Care manager reports are independently investigated by the Employer's human resources department which is responsible for determining what, if any, discipline is appropriate (Tr. 183–185, 320, 360–361, 483, 498, 641–642). The Board has, as the Hearing Officer correctly noted, found that individuals who merely report possible infractions are not exercising the power to discipline within the meaning of Section 2(11) of the Act. Disciplinary authority will be found only where the putative supervisors can impose discipline without investigation by higher level managers. See, e.g., *Republican Co.*, 361 NLRB No. 15, at slip op. 5 (2014). Given this standard, I find the Hearing Officer appropriately decided that the Employer failed to prove the care managers have the power to discipline other workers, and I adopt her conclusion on this point.

I also adopt the Hearing Officer's refusal to find supervisory status on the basis of the care managers' job description. The Board has made clear its refusal to rely on paper authority in assessing whether individuals should be deemed statutory supervisors. See, e.g., *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Similarly, the Hearing Officer properly refused to consider secondary indicia such as the supervisor-to-employee ratio in determining whether the Employer established the Care Managers as supervisors. See, e.g., *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) and *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 24, at slip op. 3 (2014).³

³ The Employer argued at the hearing that Care Managers should be deemed supervisors because they are in some cases occasionally asked to substitute for Clinical Directors (Tr. 743–746). To support this claim, it produced a summary showing the number of times each Care Manager acted as a Clinical Director during the period from January to October 2015 (Er-8). This summary showed a wide range in the frequency with which individual Care Managers served in the Clinical Director position with most Care Managers substituting on relatively few occasions. Of the 15 Care Managers shown on the exhibit, 10 acted in the Director position less than 10 times and 3 did not act at all. Some Care Managers did act more frequently but there did not appear to be any discernible pattern to their service as Clinical Directors. Katrina McNeal, for instance, served as a substitute Clinical Director on 26 occasions during the period shown on the Employer's exhibit, but most of that service occurred during the month of February 2015, and McNeal did not act at all in the months of September or October 2015. Further, former Center Nurse Executive Patricia Melora indicated that Care Managers do not necessarily exercise all of the authority associated with the Clinical Director position when acting as substitutes (Tr.

This leaves the Employer's claim that the care managers exercise supervisory powers in assigning and directing subordinates. Although I agree with the Hearing Officer that the Employer failed to prove that the care managers exercise supervisory authority in these areas, I do so for the reasons set out below.

1. Assignment

According to the Board, the term "assign" as used in Section 2(11) refers to "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare, Inc.*, supra, 348 NLRB at 689. The Care Managers' role in these areas is quite limited.

Scheduling Manager Melissa Yarnes determines the days, shifts and floors to which employees will be assigned. The Employer has created pre-printed forms which divide floors for purposes of cart nurse and nursing assistant assignments into equal groups of patient rooms. Cart nurses working on the third floor of the Employer's facility, for instance, will be assigned to either rooms 301–315, rooms 316–331, rooms 332–347 or rooms 348–362. The forms also show the break times for each nurse and assistant and indicate ancillary duties associated with each set of rooms. The nurse designated to work rooms 301–315, for example, is also supposed to handle "AED monitor & Code cart check Monitor pt (Fire)." (Er-22; Tr. 575–582).

Clinical directors or care managers fill in the assignment sheets. The sheets are normally completed by the director or care managers on preceding shifts. Night shift Director Summer Valenti, for instance, completes the assignment sheets for the day shift cart nurses and nursing assistants. Valenti always fills out the sheets when she is present. Night shift care managers only do the day shift assignments on nights when Valenti is out. (Tr. 384, 687–689, 206). Care managers on day shift do sometimes fill out assignment sheets even if clinical directors are present. Scheduling Manager Yarnes testified to her impression that Care Managers on day shift contacted her about the sheets more often than Directors. Beyond this, the record does not indicate how frequently day shift care managers are asked to fill out the sheets. (Tr. 500, 576, 206).

443, 505–506). To establish supervisory status based on substitution, the Employer was obliged to show that the Care Managers as a group spent a regular and substantial portion of their time acting in the Clinical Director position. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 698–699 (2006). In view of the limited substitution by many Care Managers and the absence of any regular substitution pattern, I find the Employer failed to meet this burden.

Most cart nurses have permanent room assignments—i.e., they are assigned to work the same group of rooms on every shift they work. Nursing assistants are not officially given permanent assignments but are also normally assigned to work the same group of rooms whenever they work. In filling out assignment sheets, the directors and care managers begin by penciling cart nurses and nursing assistants into their permanent assignments. Floaters or agency nurses are then assigned to open slots. If more than one employee without a permanent assignment is present, Care Manager Marsha Lake reported considering employee skill level and patient acuity in deciding on the open slot into which the nonpermanent employees should be placed. She did not say how often this occurred (Tr. 289–290, 344, 608, 640, 687, 191, 208, 254–255).

If a cart nurse is absent, a care manager will handle her patients. A rotation is used to determine which care manager will take the assignment. Care Manager Martha Lake reported that normal assignments might be shifted when a care manager is obliged to fill in so that the Care Manager has the easiest patients and will be able to also perform her Care manager functions. Lake did not provide specific examples of such assignment shifts or indicate how often they take place. (Tr. 287, 291–292, 374, 633.)

The Employer has developed revised assignment sheets which are used if nursing assistants call off. Like the normal sheets, the revised sheets divide a floor into an equal number of rooms so that each assistant has a roughly equal assignment. As I noted above, each floor is divided into two hallways. When an odd number of assistants is present, one of the assistants is obliged to handle patients in both hallways. Care managers may ask for a volunteer in this situation or assign the assistant whose normal room assignments are closest to the other hall. (Tr. 501–502, 609, 634–636, 673–674, 132.)

Normal room assignments are occasionally altered for reasons other than employee absences. Two nurses with same permanent room assignment will sometimes be assigned to the same shift. Care Manager Marsha Lake indicated that in this situation she will typically have the nurse who most recently worked handle her usual assignment and reassign the other nurse. (Tr. 256, 343, 346.) Care Manager Rachel Upshur reported that the nurses themselves usually decide who will switch in this situation (Tr. 640–641). Neither Lake nor Upshur indicated how often this problem comes up.

Patients sometimes object to particular cart nurses or nursing assistants, and a care manager or clinical director will have the nurse or assistant trade patients with another employee to resolve the problem. Care Manager Lake

was able to recall two occasions on which she made such switches. Care Manager Kelly McCarthy remembered being involved in one change due to a patient complaint. (Tr. 257–259, 297–299, 192, 314–317.)

Lake also testified that she will sometimes have a second nursing assistant assist with particular patients if the patient has a history of being difficult or has a condition which would make it unsafe for just one employee to provide care. She did not provide specific examples of situations in which this has occurred or indicate how often it takes place (Tr. 259).

One of the nurses assigned to Lake's area has difficulty providing wound care, and Lake indicated that she might switch patients if a patient requiring wound care was admitted to this nurse's regularly assigned area. She was able to cite one example of this taking place. When a patient with a particularly serious wound was assigned to the nurse's area, the nurse confessed that she was not good at wound care. According to Lake, this confession prompted a decision to switch patients with another nurse. (Tr. 256, 306–307, 311.)⁴

Beyond the examples cited above, the record does not contain evidence of Care Managers making changes in the overall employee assignments set out in the Employer's assignment sheets.⁵ In fact, Care Manager Upshur testified that the only time she alters assignments is when there is a call out. (Tr. 656.)

Analysis

As I noted above, the role of care managers in the assignment of subordinate employees is limited. Scheduling Manager Yarnes decides the days, shifts and floors on which employees will work. Pre-printed forms determine how patients on a particular floor will be divided among the employees. Clinical directors frequently fill out the pre-printed forms. And, to the extent care managers complete the assignment sheets, they merely pencil employees into their normal spots and slot extra workers into any remaining openings. This process does not appear to involve any exercise of significant judgment.

⁴ Lake generally asserted that she would also switch assignments if a nurse with no "trach" experience was assigned to a "trach" patient. She conceded, however, that this has never happened (Tr. 323–324, 326).

⁵ In its Memorandum in support of Exceptions, the Employer cites as evidence of assignment power some examples which are more appropriately considered as "direction." For instance, care managers will sometimes ask employees to assist with particular admissions, to start IVs if the employee assigned to a patient is not certified for IVs or to handle a specific treatment if the nurse assigned to a patient lacks experience. In the Board's view, such individual assignments are part of directing work and do not involve the overall designation of tasks which it regards as "assignment" within the meaning of Section 2(11). *Oakwood Heathcare, Inc.*, supra at 689.

Care managers do become involved if assignments have to be shifted due to employee absences, but there is, once again, little evidence that much judgment is involved. A care manager will substitute if a cart nurse calls off, and the selection of the substitute is determined by a rotation. Pre-printed forms determine how work is to be divided if nursing assistants are absent. At most, a care manager might be required to determine which assistant will have to handle patients on two hallways, and this determination appears to be made by either soliciting volunteers or designating the assistant whose normal assignment is located closest to the point at which the hallways intersect. There is no indication employee skill or ability is considered.

In some situations, care managers do appear to exercise judgment in adjusting overall patient assignments, but much of the Employer's evidence regarding such situations lacked specificity. Care Manager Lake reported considering employee skills when she is obliged to fill more than one open slot in a schedule and claimed continuity of care governed when two employees with the same permanent assignment turned up on the same shift and one had to be moved. But, Lake did not describe any specific examples of these situations or suggest how often they arose. Further, Care Manager Rachel Upshur testified that cart nurses often decide on their own who will move if two nurses with the same permanent assignment are scheduled together.

Lake also claimed she will sometimes have two assistants handle a patient jointly, but she did not describe specific examples of this taking place or indicate that relative employee skill and ability determines which assistant will be asked to help in this situation. Lake did generally say that she will reassign patients if employees have difficulty performing treatments the patients require, but she could cite only one example in which such a switch was made and the switch was instigated by the employee rather than Lake. Lake and fellow Care Manager Kelly McCarthy testified to changing assignments due to patient complaints, but could only identify three situations in which such reassignments were made.

In short, the evidence of care managers making adjustments in assignments which at least arguably required some level of judgment was either lacking in specificity or involved just a handful of incidents. As the proponent of supervisory status, the burden was on the Employer to prove that the care managers used independent judgment in making overall assignments of work. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). And, the Board will not find supervisory status absent specific evidence that an individual has exercised supervisory authority on a more

than occasional or sporadic basis. *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, at slip op. 2–3; *Modesto Radiology Imaging, Inc.*, supra at slip op. 3; *Republican Co.*, supra at slip op. 8; *Lynwood Manor*, 350 NLRB 489, 490 (2007). To the extent the Employer provided specific evidence, it shows Care Managers either making routine assignments or exercising judgment in altering assignments on rare occasions. Agreeing with the Hearing Officer, I find that the Employer failed to prove that the care managers “assign” work within the meaning of Section 2(11).

2. Responsible direction

Direction as defined by the Board includes making discrete assignments and monitoring the performance of subordinates. See, *Golden Crest Healthcare Center*, supra at 730. To establish supervisory status under this criteria, a party is obliged to demonstrate that the alleged supervisors used independent judgment in providing direction, had the ability to take corrective action in the event subordinates failed to follow their instructions and could suffer consequences, negative or positive, as a result of their subordinates’ performance. *Community Education Centers*, 360 NLRB 85, fn. 1 (2014).

It seems clear from the record that Care Managers do direct the work of the cart nurses and nursing assistants. Care Managers Lake and McCarthy testified that they monitor cart nurses to make certain proper treatments are being given, prescribed medications are being dispensed and reports are being completed (Tr. 132, 272). Similarly, former Care Manager Janice St. John indicated that she spoke to employees if she noticed they had not completed tasks and cart nurse Kellie Stevens reported having care managers talk to her about her failure to finish work in a timely manner (Tr. 50, 683).

There is also evidence of Care Managers making discrete assignments. If multiple patients are admitted to an area assigned to a particular cart nurse, care managers will assign another nurse to handle one of the admissions (Tr. 262, 300, 188). Care managers direct assistants and cart nurses to change catheters or turn patients more frequently than required by Employer protocols (Tr. 447–448, 452–454). If an emergency arises with a patient, the care manager may direct employees to perform particular tasks in connection with the emergency although there is also evidence that cart nurses sometimes take control in this situation (Tr. 642–645, 661, 141–143, 269, 272). Care managers may ask employees to assist other workers who have fallen behind in distributing medications. On occasion, care managers have nurses handle treatments on another nurse’s patients if the nurse assigned to the patient is inexperienced or has trouble performing particular treatments (Tr. 188–189, 140, 256). When IVs

must be started, Care managers make certain the employee handling the task has the necessary certifications (Tr. 271).

The record also shows that care managers can take corrective action if assignments are not handled properly. Care Manager McCarthy reported counseling employees about taking overlong breaks or failing to inform her of changes in a patient’s conditions (Tr. 152). Care Manager Upshur indicated that she informs a clinical director if she receives reports of employees failing to perform assigned tasks (Tr. 663–664). And, the Employer produced evidence of two occasions on which employees were disciplined as a result of incidents reported by care managers (Er-14 to 19).

As the Hearing Officer correctly noted in her Report, however, there is not much evidence that care managers exercise independent judgment in monitoring and assigning work. The tasks performed by cart nurses and assistants appear routine, and none of the witnesses explained how independent judgment is required to make certain that medications or treatments have been given or reports filled out. Care managers do exercise medical judgment in deciding that catheters should be changed or patients turned more frequently, but there is no evidence supervisory judgment is exercised in determining which employee should be assigned to perform the required tasks. Making certain employees are certified to insert IVs requires care managers to simply check for the required certification and does not require any independent evaluation of employee skills and abilities. Assignments in emergencies appear to be based mostly on availability as do adjustments made when an employee falls behind in her work (Tr. 302). Further, emergencies are not regular occurrences. Former Center Executive Melora testified that there were only four or five emergencies between January and November 2015 (Tr. 508).

Care Manager Lake did testify that she sometimes considers experience and ability in deciding which cart nurse to ask to assist with admissions (Tr. 260–261). But, Lake also made clear that availability is a critical factor in deciding who to have assist. If the nurse assigned to the area to which a patient is to be admitted is not done with her regular assignments and another nurse is finished, then Lake will assign the admission to the nurse who is free (Tr. 326–327). The Board has indicated that this sort of reassignment to equalize workloads does not require independent judgment and is not evidence of supervisory authority. *Golden Crest Healthcare Center*, supra at 730, fn. 9. Lake reported that she makes reassignments related to admissions at least twice per month (Tr. 268), but she did not indicate how many of these reassignments involve considerations of relative

skill as opposed to availability. As a consequence, it is not clear assignments based on skill and experience take place on more than a sporadic basis.

To the extent care managers shift treatments because of cart nurses' experience levels or ability to perform tasks, independent judgment is plainly involved. But, the Employer did not establish that such reassignments take place with sufficient frequency to support a finding of supervisory status. Lake reported reassigning wound care away from a particular nurse, but did not say how often she made such reassignments beyond recounting one specific example (Tr. 271, 306–307, 311).

Other than Lake, Care Manager McCarthy was the only witness to testify about shifting specific assignments based on concerns about the ability of employees to handle tasks. According to McCarthy, she will perform a task if she is concerned that the cart nurse assigned to a patient does not have sufficient experience (Tr. 140). She did not say how often she steps in and did not report reassigning tasks to other nurses. In short, agreeing with the Hearing Officer, I find the evidence insufficient to show that care managers exercise independent judgment on more than a sporadic basis in directing the work of subordinates.

I also find that the Employer failed to demonstrate that care managers are held accountable for the performance of the cart nurses and nursing assistants. Most of the testimony presented by the Employer on this point was conclusionary. Former Center Executive Melora, for instance, declared that care managers are accountable for making certain the work of subordinates is completed in a timely manner and claimed she had spoken with care managers about subordinate performance but did not offer specific examples (Tr. 423–424). Care Manager McCarthy testified that she considers herself responsible for the performance of subordinates, but did not explain the basis for this conclusion. Further McCarthy admitted that none of her superiors have ever spoken to her about a subordinate's failure to perform as expected (Tr. 151). Care Manager Upshur and former Care Manager St. John concurred with McCarthy on this latter point, testifying that they were never disciplined or held responsible for subordinate performance (Tr. 645, 675).

Care Manager Marsha Lake was the only witness to offer more specific testimony on the issue of accountability. Lake reported that Melora stated when Lake was hired as a care manager that Lake would be responsible for the work of cart nurses. Lake also described an incident in which she was questioned by a clinical director as to why a nurse did not appear to have given a patient

required fluids (Tr. 274, 295–296).⁶ Although Lake believed she could have been disciplined if the nurse had neglected to provide fluids, she did not say she had been told this. In fact, Lake did not report ever actually being told she would suffer consequences as a result of subordinate performance.

The Board has made it clear that conclusionary testimony and witness suppositions are not sufficient to establish that an alleged supervisor is held accountable for subordinate performance. To establish supervisory status under the responsible direction criteria, a party must demonstrate by specific evidence that the alleged supervisors have suffered, or at least have been told they will suffer, consequences if the employees they supposedly supervise fail to perform. *Community Education Centers, Inc.*, supra slip op. 1–2; *Lynwood Manor*, supra at 490–491. Such evidence is completely lacking here, and I find, as did the Hearing Officer, that the Employer has failed to demonstrate that its care managers responsibly direct other workers.

In sum, I adopt the Hearing Officer's conclusion that the evidence produced by the Employer is insufficient to demonstrate that care managers are statutory supervisors. And, lacking evidence that the Care Managers are supervisors, I find that pro-Petitioner remarks they made in the period leading up to the election did not taint the result. To the extent the Employer's objections are based on the conduct of the care managers, I agree with the Hearing Officer that they should be overruled.

C. The Conduct of Clinical Director Summer Valenti

In addition to relying on the behavior of its Care Managers, the Employer contends that Clinical Director Summer Valenti engaged in objectionable conduct during the period leading up to the representation election in this case. To support this claim, it introduced testimony by Care Manager Kelly McCarthy regarding a single arguably prounion comment made by Valenti.

Referring to Petitioner's organizing campaign, McCarthy indicated that the remark in question had been made "well before all this was put into place."⁷ Employees at the Employer's facility conduct mid-shift "huddles" to review the status of patients. During a huddle, employees complained about staffing. Valenti responded by saying, "Well there's always the Union, but I can't be part of that." (Tr. 127–129.) McCarthy did not report

⁶ An investigation disclosed that fluids had actually been given and that the nurse had simply failed to complete the appropriate records.

⁷ The Hearing Officer mistakenly found in her Report that McCarthy did not place Valenti's comment in time. Correcting this error, I find the remark was described by McCarthy as having been uttered a substantial, but unspecified, period of time prior to the start of the organizing effort.

any other prounion comments by Valenti, and the Employer did not present evidence of additional prounion remarks by Valenti or any other Clinical Director. The Employer's claim of taint rests entirely on the lone remark reported by McCarthy.

Applying the standards set out by the Board in *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), I have no difficulty in finding Valenti's one comment insufficient to justify overturning the election. The remark was made well in advance of the organizing campaign and outside the critical period between the filing of the petition and the election. Moreover, it was an isolated comment. Although Valenti had authority over the employees who heard the remark, the comment was not accompanied by any hint of coercion and Valenti specifically indicated that she would not be involved in any organizing campaign. Further, there is no evidence of Valenti's comment being disseminated beyond the individuals present when she made the remark or of employees commenting on Valenti's statement after it was made.

At most, Valenti made a mildly prounion comment well before the start of the organizing campaign. The Board has refused to overturn elections despite far more extensive prounion conduct by supervisors. See, *Laguna College of Art and Design*, 362 NLRB No. 112, at slip op. fn. 3 (2015); *Northern Iowa Telephone Co.*, 346 NLRB 465 (2006). I find that Valenti's comment did not taint the election.

The Employer argues in its Memorandum in Support of Exceptions that I should reconsider a ruling I made during the hearing denying the Employer's request that I enforce a subpoena requiring Valenti to produce texts, e-mails and other social media postings in her possession regarding Petitioner's campaign. Having reconsidered the matter, I adhere to my original decision.

Valenti remained employed by the Employer at the time of the hearing in a supervisory clinical director position. The Employer introduced into evidence during the hearing an affidavit signed by its counsel describing contacts he had with Valenti. The affidavit portrays Valenti as mostly cooperative. She initiated contact with counsel shortly after the election, discussed dates for her appearance as a witness at the hearing and forwarded documents to counsel (Er-27). Given Valenti's position and her apparent willingness to cooperate, it seems likely counsel asked her about any prounion comments she might have made beyond the single remark reported by McCarthy.

Further, the Employer called as witnesses both McCarthy and another employee, Kelli Stevens, who worked with Valenti on the night shift during the lead up to the

representation election. If Valenti had been campaigning for Petitioner prior to the vote, it seems likely McCarthy and Stevens would at least have heard of her activities and Employer counsel would have discovered the conduct when interviewing McCarthy and Stevens. Through either Valenti or McCarthy and Stevens, the Employer should have been in position to discover any prounion activity engaged in by Valenti beyond the one comment mentioned at the hearing.

The Employer did not, however, allude at the hearing to any concrete evidence of additional prounion conduct by Valenti, and it does not make reference to such evidence in arguing now that the hearing should be reopened to allow it to examine Valenti's personal electronic devices. And, the Employer's failure to refer to any evidence suggesting additional conduct by Valenti makes it reasonable to infer that it has not been able to uncover such evidence despite having a more than reasonable opportunity to do so.

Given the circumstances, the Employer's subpoena to Valenti is, at best, a fishing expedition. The Employer may hope the subpoena will turn up objectionable conduct but has offered no particular reason to think that it will. In this situation, I find that delaying the proceedings to enforce the Employer's subpoena would be inappropriate. The waste of time involved clearly outweighs the remote chance that the subpoena will reveal probative material. I reaffirm my original decision and deny the Employer's request to reopen to record so that the Valenti subpoena can be enforced. And, in the absence of evidence of conduct in addition to Valenti's lone prounion remark, I shall overrule the Employer's objections.

D. Conclusion

Based on the above, I find that the Employer's objections do not constitute grounds for setting aside the election. The objections are hereby overruled. Accordingly, I am issuing a Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid votes counted have been cast for District 1199C, National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Staff/Bedside Registered Nurses (RN) and Licensed Practical Nurses (LPN) employed by the Employer at its facility located at 113 South Route 73, Voorhees, New Jersey; excluding all other employees, Office Clerical Employees, Clinical Directors, Care Managers, Health Unit Coord-

dinators (HUCS), Clinical Reimbursement Coordinators, Clinical Reimbursement Analysts, Nurse Practice Educator, Managerial Employees, Guards and Supervisors as defined in the Act.

REQUEST FOR REVIEW

Pursuant to the provisions of Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. This request for review must conform with the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by Washington by August 15, 2016. If no request for review is filed, the decision will be final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile transmission. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy on the other parties and file a copy with the undersigned. A certificate of service must be filed with the Board along with the request for review.

Dated August 1, 2016⁸

⁸ Regional Director Dennis P. Walsh is recused from this matter.